RESPONSE REQUESTED

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Supreme Court, U.S.
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NO. 01-8419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

KENNEDY KIRK,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA, RESPONDENT

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MAY IT PLEASE THE COURT:

Respondent, the State of Louisiana (hereinafter "the State"), respectfully requests that this Court deny the applicant's petition for a writ of certiorari, seeking review of the decision of the Louisiana Supreme Court summarily denying his application for writ of certiorari. Said denial of certiorari is reported as State v. Kirk, 2000-KH-3395 (La. 11/09/01) 801 So.2d 1063. Copies of the transcripts from the hearing on petitioner's motion to suppress and petitioner's trial, as well as copies of the affidavit, order of search and return, are attached hereto as Exhibits "A," "B," and "C". Also included are copies of the decisions of the Louisiana Fourth Circuit Court of Appeal and the Louisiana State Supreme Court, attached hereto as Exhibits "D" and "E."

PROCEDURAL HISTORY

Petitioner, Kennedy Kirk was charged by bill of information with possession with the intent to distribute crack cocaine, in Orleans Parish Criminal District Court case number 398-116 "G." (Rec. p. 1-2); La. R.S. 40:967(B)(1).[1] The trial court found probable cause for the petitioner's arrest, and denied his motion to suppress the evidence. At the trial held September 22, 1998, a 12-member jury found the petitioner "guilty as charged" of possession of cocaine with the intent to distribute it. On November 23, 1998, the trial court sentenced the defendant to serve fifteen years at hard labor in the custody of the Department of Corrections. It is from his conviction in case 398-116 "G" that petitioner now seeks certiorari.

An appeal was taken on March 27, 2000, urging that the trial court erred in denying the defendant's motion to suppress the evidence. The Louisiana Fourth Circuit affirmed his conviction and sentence, noting that the defendant's argument that there were no exigent

[1] Paul Cook was charged in the same bill of information with possession with the intent to distribute crack cocaine. Charges against Cook were dismissed on September 22, 1998, following his death.

circumstances to justify the warrantless entry of the apartment was irrelevant as the evidence was not found in the apartment but on his person, stating "The officers had probable cause to arrest and properly searched the defendant incident thereto." State v. Kirk, 00-KA-0190, 773 So.2d 259 (La. App. 4 Cir. 11/15/00). Petitioner did not seek a re-hearing in the Fourth Circuit. On December 12, 2000, petitioner applied to the Louisiana Supreme Court for writ of review.

The Louisiana Supreme Court summarily denied petitioner's writ on November 9, 2001, with four justices voting to deny the writ, and three to grant the writ. State v. Kirk, 2000-KH-3395 (La. 11/09/01) 801 So.2d 1063. Chief Justice Calogero dissented from the denial of certiorari with written reasons, stating that the defendant was arrested inside an apartment without a warrant, and that the State had not established that exigent circumstances were present. The instant application for certiorari followed.

FACTS OF THE CASE[2]

Members of the New Orleans Police Department received a hotline complaint alleging that drugs were being sold from 2316 Washington Avenue, Apartment 15. Exhibit A, Motion p. 2, l. 17-19, l.23-24; p. 4, l. 15-16. In response to this complaint, Detective John Brunet and other members of the New Orleans Task Force initiated a covert surveillance of the apartment on May 5, 1998. Exhibit A, Motion p. 2, l. 17-19, l. 23-24; p. 3, l. 3-5.

During the police surveillance, Detective Brunet witnessed approximately four suspected narcotics transactions at the apartment, in which persons approached the apartment door and exchanged currency for small packages. Exhibit B, Trial p. 3, l. 13-27. Apartment occupants Kennedy Kirk and Paul Cook were seen participating in these transactions. Exhibit B, Trial p. 3,

[2] Louisiana law permits appellate review of a motion to suppress to be based on evidence presented both at the motion hearing, and at trial. State v. Nogess, 98-0670, 729 So.2d 132, 137; State v. Carter, 94-2859,664 So.2d 367 (La. 11/27/95).

l. 28-32; p.4, l. 1-10. When Brunet observed a purchaser later identified as Leslie Butler examine the contraband by the door, and again upon reaching the sidewalk, Brunet was left with no doubt that Butler had purchased contraband narcotics from the occupants of the apartment. Exhibit B, Trial p. 4, l. 15-23. When a takedown team stopped Butler near the intersection of LaSalle and Washington, approximately half of a block from the apartment at 2316 Washington Avenue, Butler was found to be in possession of crack cocaine. Exhibit A, Motion, p. 9, l. 29-p. 10, l. 3. Butler admitted purchasing cocaine from 2316 Washington Avenue, Apt. 15. Exhibit C, Warrant Application.

Officers elected to obtain a search warrant for 2316 Washington Avenue, Apt. 15. Exhibit B, Trial p. 6, l. 1-8. Fearing that Kennedy and Cook would be alerted to the arrest of Butler, which occurred only half a block from the apartment, the officers decided to secure the apartment prior to obtaining the warrant, to prevent the possible destruction of evidence. Exhibit B, Trial p. 6, l. 1-8; Exhibit A, Motions p. 13, l. 9-13 During this initial warrantless entry of the apartment, police officers frisked occupants Kirk and Cook, but did not seize any evidence from them. Exhibit B, Trial p. 11, l. 1-19.[3] Officers observed narcotics paraphernalia in plain view, but did not seize it. Exhibit B, Trial p. 10, l. 13-19; p.12-15. Officers secured two handguns which were within the reach of Kirk and Cook. Exhibit B, Trial p. 8, l. 7-10; p. 9, l. 22-24; p. 10, l. 16-19. Detective Brunet left the apartment to obtain a warrant, while other officers, the defendant, and Cook, waited in the apartment. Exhibit B, Trial p. 20, l. 24-p. 21, l. 1.

Within approximately two hours, Detective Brunet obtained a search warrant. Exhibit B,

[3] In Detective Brunet's motion hearing testimony, he discusses a frisk search of the Petitioner which revealed "a plastic medicine-type bottle in his front underclothes." Exhibit A, Motion p. 14, l. 23-27. The frisk search took place when the apartment was secured. Detective Brunet's trial testimony clarifies that while objects were felt on petitioner and the codefendant during the frisk search, those items were not recovered until after the warrant was obtained, as stated above.

Trial p. 20, l. 11-23. The warrant application contained information regarding the surveillance of the apartment, the takedown of Leslie Butler, and Butler's admission that he had purchased cocaine from the target apartment. Exhibit C, Warrant Application. The application stated that the apartment had been secured pending application for the warrant, but contained no information learned by the officers during the initial warrantless entry. Id[4]

When Detective Brunet returned with the warrant, the officers seized evidence which they had observed in plain view in the front room of the apartment, including two clear glass tubes containing cocaine residue, a black film case containing cocaine residue, a clear plastic container with cocaine residue, and a chrome smoking pipe. Exhibit B, Trial p. 12-15; p. 33-34. During a search of Kennedy Kirk, officers recovered a plastic container containing fifty-nine pieces of crack cocaine from Kirk's underwear, and 283 dollars. Exhibit B, Trial p. 11, l. 24-27. Police recovered a plastic container containing nineteen pieces of crack cocaine from Paul Cook's pocket. Exhibit B, Trial p. 11, l. 24-27; Paul Cook and Kennedy Kirk were placed under arrest. Exhibit B, Trial p. 17, l. 26-p. 18, l. 2.

SUMMARY

Petitioner's application for certiorari should be denied for the following reasons.

There is no point to be served by this Court reviewing this issue. No conflict within the federal circuits can be addressed, and/or corrected, nor is there a need to correct an improper application of federal law, or federal Constitutional issues.

The State contends that under the facts of this case, the circumstances were such that the

[4] Petitioner incorrectly alleges that information learned during the initial entry into the apartment was included in the search warrant. Although when questioned in this regard, Det. Brunet stated "I'm sure its in there," the question referred to the mere fact of whether the magistrate had been informed that the apartment had been seized. Exhibit B, Trial p. 27, l. 21-25. An examination of the warrant application reveals that no facts learned during the initial entry were placed in the application. Exhibit C, Warrant Application.

officers were justified in the good faith belief that their investigation had been compromised and that evidence would be destroyed if they did not secure the premises prior to obtaining a search warrant. However, the State submits that there is no purpose in this Court granting certiorari on this issue, when the independent source doctrine, an exception to the exclusionary rule, would permit the introduction of the seized items even if this Court determined that the officers' initial entry into the apartment was without exigency and illegal.

ARGUMENT

I. Through their investigation, including the takedown of a purchaser, officers had established probable cause to believe that the petitioner was actively selling crack cocaine from the target apartment. Exigent circumstances justified the officers' actions in entering and securing the apartment and its occupants prior to obtaining a warrant.

A. Probable Cause

Probable cause to arrest or search exists when the facts are such that a reasonable man would be warranted in believing that the person to be arrested has committed a crime, or that evidence of a crime can be found in the place to be searched. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The expertise and experience of a police officer may be taken into account in a determination of probable cause.

In the instant case, Detective Brunet observed approximately four suspected narcotics transactions, in which people approached the apartment and gave money to either the petitioner or Paul Cook in exchange for a small package. Detective Brunet observed the final purchaser, Leslie Butler examine his package closely upon returning to the sidewalk, and was left with no doubt that Butler had purchased narcotics. A takedown of Butler confirmed that he was in possession of crack cocaine, and Butler admitted to officers that he purchased this cocaine from the target apartment. Clearly officers had probable cause to believe that Petitioner and Cook were

engaged in the distribution of crack cocaine from the apartment, and that additional quantities of crack cocaine could be recovered from the apartment.

Petitioner argues that the officers did not believe there was probable cause to search or arrest at the time of the initial entry.[5] However, an officer's subjective intent is irrelevant to the objective determination of whether probable cause exists. Moreover, Detective Brunet testified that the residence was entered for the purpose of securing it to prevent the destruction of evidence while a warrant was sought, therefore officers clearly intended to obtain a warrant and believed there was probable cause. Exhibit B, Trial p. 5, l. 28-p. 6, l. 8.[6]

B. Exigent circumstances existed which justified the officers entry to secure the apartment to prevent the destruction of contraband prior to obtaining a warrant.

A warrantless seizure by law enforcement, based upon probable cause may be lawful where exigent circumstances, such as the potential destruction of evidence exist. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966); Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838.

Here, officers observed several individuals make suspected purchases of narcotics, before they stopped Butler and confirmed that Kirk and Cook were distributing narcotics from the apartment. Butler was stopped approximately one half block from the apartment, at the

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[5] In support of his argument, Petitioner cites the following exchange between defense counsel and Detective Brunet:

Q: Based on the information you had, why didn't you go for the warrant before you entered the place? It's not enough information to obtain the search warrant?"

A: No Judge or Magistrate would have signed it.
Exhibit B, Trial, p. 21, 2-7.

[6] Sergeant Steve Gaudet when asked whether Brunet had enough information to get a warrant stated "Sure he did. He observed the transaction." Exhibit B, Trial p. 53, l. 23-28.

intersection of LaSalle and Washington. Officer testified that due to the nearness of the stop to the apartment, and the pedestrian traffic in the area, they believed that the occupants of the apartment might be alerted to the surveillance. Having just observed four transactions occur at that apartment, officers were clearly justified in believing that persons passing the scene of the takedown would inform the occupants of the apartment of the arrest of Butler. Officers feared the destruction of contraband.

Moreover, it appears from the record that the takedown took place within view of the apartment. Detective Brunet testified:

> As I stated earlier, the apprehension [apartment?] was in the middle of the block. The take down was on LaSalle Street which is like half a block away. Half a block away. We were supposed to go down once he made the turn and was out of the view of the apartment we were supposed to take him down. According to the plan, we were to take down the subject, seize the apartment and I would have moved to obtain a search warrant but it didn't happen that way.

Exhibit B, Trial p. 26, l. 29-p.27, l. 6.

II. The officers properly obtained a valid search warrant predicated upon information known to them before the initial entry into the apartment, and were not prompted to obtain that warrant by information learned during the initial entry. The independent source doctrine therefore permits the admission of the seized evidence regardless of whether exigent circumstances existed to justify the initial entry.

The independent source doctrine is an exception to the exclusionary rule and permits the introduction of illegally obtained evidence where the police had an independent source for the discovery of the evidence.

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that facts thus obtained become sacred and inaccessible . If knowledge of them is gained from an independent source they may be proved like any others. . .

Silverthorne Lumber Co. V. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *see*

also Segura v. United States, 468 U.S. 796, 805, 104 S.Ct. 3380, 82 L.Ed. 2d 599 (1984) (noting that evidence is not to be excluded if police had an independent source); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (same). The basis for the rule is the well-established principle that "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint'." Segura, 468 U.S. at 797, 104 S.Ct. 3380 (*citing* Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

In the instant case, officers had already decided to seek a search warrant prior to the entry into the apartment and detention of the defendant. Detective Brunet testified that the purpose of the entry into the apartment was to prevent the destruction of evidence while a warrant was being obtained. Therefore, the officers' observations during the entry did not prompt officers to seek a search warrant. Additionally, contrary to petitioner's representations, no information discovered during the initial entry was included in the application for the warrant. (Exhibit) The warrant application contains only information learned prior to the entry, and notes that the apartment was secured without any reference to the persons found therein, or items seen therein.

Assuming *arguendo* that the initial entry was illegal, the officers did not exploit this illegality, but obtained a valid search warrant within a short period of time, approximately two hours. The information known to the police prior to the entry provides an independent source for the issuance of a valid search warrant for the apartment. In the initial entry, officers conducted a frisk search of the persons present, and such limited search of the apartment as was necessary to ascertain that no weapons were accessible to the petitioner or Cook. As the evidence was seized during the execution of a valid search warrant, and subsequent arrest of the defendant, the Fourth Circuit correctly concluded that a finding of exigent circumstances was irrelevant to a

determination of the admissibility of the evidence recovered, and that the evidence was recovered pursuant to a search incident to a valid arrest.

CONCLUSION

For the foregoing reasons, petitioner Kennedy Kirk should be denied a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anne M. Dickerson, a member of the bar of this Court, hereby certify that a copy of this Brief in Opposition to the application of Kennedy Kirk for a writ of certiorari has been mailed to counsel for petitioner, postage pre-paid and addressed to:

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This 13th. day of March, 2002
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